IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

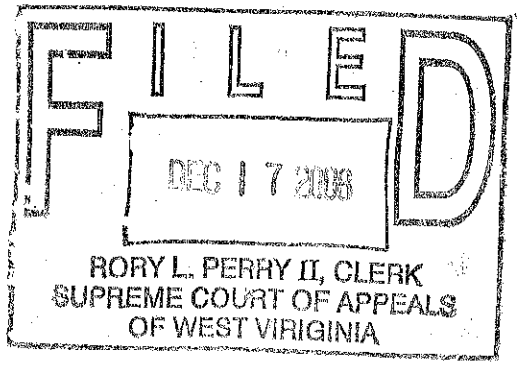
No. 34426

MOUNTAIN AMERICA, LLC, ET AL., Petitioners Below, Appellants

v.

THE HONORABLE DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY, WEST VIRGINIA, and THE HONORABLE H. ROD MOHLER, ESQUIRE, PROSECUTING ATTORNEY OF MONROE COUNTY, WEST VIRGINIA, and THE COUNTY COMMISSION OF MONROE COUNTY, WEST VIRGINIA, Respondents Below, Appellees.

BRIEF OF THE COUNTY COMMISSION OF MONROE COUNTY, WEST VIRGINIA



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The County Commission of Monroe County, West Virginia (the "County Commission"), by counsel,[1] hereby respectfully submits this appellee's brief in accordance with Rule 10 of the Rules of Appellate Procedure. For the reasons stated herein, the County Commission respectfully requests that this Court deny the relief sought by the Appellants.

I. SUMMARY OF THE ISSUES ON APPEAL

This case involves only two central issues which are properly before this Court. The first issue is whether the real estate in Monroe County owned by a sole Appellant, namely Mountain America, LLC, was properly assessed for the 2007 tax year. Mountain America, LLC is the developer of Walnut Springs Mountain Reserve ("Walnut Springs"). At the time of assessment, Mountain America, LLC had five (5) tracts or parcels of real property which were unsold lots or undeveloped residue property (the "unsold lots and residue"). Donna Huffman, the Assessor of Monroe County ("Assessor"), valued Mountain America's unsold lots and residue at approximately $728,300.00, with the taxes assessed on this property totaling approximately $9,500.00. As will be shown herein, the real estate of Mountain America, LLC was properly assessed for the 2007 tax year, and the assessments were justifiably confirmed both by the County Commission sitting as the Board of Equalization and Review and Judge Irons of the Circuit Court of Monroe County (the "Circuit Court").

The second issue is whether Judge Irons of the Circuit Court properly ruled that every Appellant other than Mountain America, LLC failed to perfect an appeal of their assessments to the Circuit Court. The Circuit Court ruled early in the case that only

[1] The undersigned counsel have been asked by H. Rod Mohler, Prosecuting Attorney of Monroe County, to represent the interests of the County Commission in this matter.

Mountain America, LLC had perfected an appeal as required by W.Va. Code § 11-3-25, and, to that end, dismissed all of the other Appellants from the case. Also as shown herein, the Circuit Court properly found that Mountain America, LLC was the sole taxpayer who perfected an appeal as required by W.Va. Code § 11-3-25.

II. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The Appellants are the developers and owners of lots within Walnut Springs Mountain Reserve ("Walnut Springs") in Monroe County, West Virginia. On February 7, 2007, the Appellants appeared by counsel before the County Commission sitting as the Board of Equalization and Review in order to protest the 2007 *ad valorem* tax assessments of their properties within Walnut Springs. At the February 7, 2007 hearing, the Appellants claimed that the assessments of their property were excessive and exceeded their true and actual value, and also that the assessments violated their constitutional rights.

The principal evidence offered by the Appellants at the February 7, 2007 hearing was the testimony and analysis of Todd Goldman. Mr. Goldman is a certified general real estate appraiser. Mr. Goldman presented a statistical analysis which compared the assessments of properties within Walnut Springs to those of properties located outside of Walnut Springs but within Monroe County. Further, Mr. Goldman compared assessments in the county to recent transactions. Transcript with exhibits of February 7, 2007 Hearing before the County Commission at 9-37 (hereinafter Tr. at ___).

Despite being a certified general real estate appraiser, Mr. Goldman did not appraise any of the Appellants' properties at issue, or any other property which was the subject of his statistical analysis. In fact, Mr. Goldman was not asked by the Appellants

to appraise their properties as determining the fair market value of the properties at issue was not his assignment. Tr. at 51-52. After a hearing of three hours, the Appellants presented no evidence whatsoever as to what their property was actually worth. Further, at the hearing, the developers of Walnut Springs who own the unsold lots or residue property did not advise the County Commission of what they had paid for this property, the listing price for unsold lots, or other basic information as to the properties at issue.

The Assessor of Monroe County, Donna Huffman (the "Assessor"), testified at the February 7 hearing that she worked with the West Virginia Department of Tax and Revenue in creating a new tax "neighborhood" comprising Walnut Springs and in calculating the assessments with respect to the Appellants' properties at issue. Tr. at 72. The Assessor explained the steps she took in arriving at the assessments. Tr. at 72, 82-91. Representatives of the West Virginia Department of Tax and Revenue's property tax division were present at the hearing along with their counsel. Tr. at 3.

The County Commission, after considering the testimony and evidence presented at the February 7 hearing, issued a written order affirming the assessments on the basis that the methods of appraisal used by the Assessor were within the guidelines provided by law. Order of County Commission dated February 15, 2007.

On March 14, 2007, a "Petition for Appeal from Ad Valorem Property Tax Assessments" (the "Circuit Court Petition") was filed with the Circuit Court of Monroe County. On March 14, 2007, Judge Irons signed an Order, which had been prepared by the taxpayers' counsel, directing the Clerk of the Circuit Court to file the Circuit Court Petition along with a record of the proceedings before the County Commission, and further ordering that:

> ...an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff upon Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney of Monroe County, West Virginia, **and Paul Papadopoulos, attorney for the Monroe County Commission** and John F. Hussell IV, attorney for the Assessor, **who shall file with this Court, and serve upon the Petitioners' counsel, within thirty (30) days from the service on her or him, respectively, a response to the Petition filed herewith.**

(emphasis added). As mandated by Judge Irons' March 14 order prepared by counsel for the taxpayers, on March 28, 2007, the undersigned, as counsel to the County Commission, filed the "Response Filed on Behalf of the County Commission of Monroe County" to the Circuit Court Petition.[2]

Three motions of a procedural nature but extreme importance to this case followed in Circuit Court. First, on April 20, 2007, the taxpayers surprisingly filed with the Circuit Court the "Taxpayers/Petitioners' Motion and Memorandum To Strike the Response on Behalf of the County Commission of Monroe County" claiming that the County Commission did not have the right to file a response or any other pleadings in the case before the Circuit Court. The County Commission opposed this motion to strike, and the motion was argued before Judge Irons on June 18, 2007. On July 17, 2007, Judge Irons signed his "Order Denying Taxpayers/Petitioners' Motion to Strike the Response Filed on Behalf of the County Commission of Monroe County." Judge Irons specifically noted in this order that "a review of the record suggests that the Commission's response originates from the Petitioner's own order submitted to this Court and entered on March 14, 2007." Indeed, as noted above and detected by Judge Irons, counsel to the taxpayers prepared an order specifically requiring the County

[2] Similarly, on April 13, 2007, Mr. Hussell of Dinsmore & Shohl LLP, as counsel to the Assessor, filed the "Response of Donna Huffman, as the Assessor of Monroe County, West Virginia, to Petition for Appeal from Ad Valorem Property Tax Assessments."

Commission to file a response to the Circuit Court Petition and Judge Irons entered the order at counsel's request. After the County Commission complied with the order by filing its response, counsel for the taxpayers nonetheless moved to strike the response claiming that the County Commission had no right to file a response and was not a proper party. In addition, Judge Irons reasoned, in part, that the United States Supreme Court opinion in *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*[3] "demonstrates that the County Commission is a proper party ..." Id.

The second procedural motion, namely a "Motion to Amend Petition for Appeal," was filed by counsel for the taxpayers on May 30, 2007. The proposed amended petition purported to delete all references in the Circuit Court Petition to the fact that the County Commission would file a response and participate in the action, and asserted for the first time that the taxpayers' due process rights had been violated as the tax appeals system in West Virginia was inherently flawed. By his Order Denying Taxpayers/Petitioners Motion to Amend Petition for Appeal dated July 17, 2007, Judge Irons denied the taxpayers' motion, in part, on the grounds that it was "beyond the scope of the original petition" and was prejudicial to the respondents.

On June 6, 2007, the County Commission filed a "Motion to Confirm Mountain America LLC as the Sole Property Owner which has Perfected and Appeal." In this third procedural motion, the County Commission argued[4] that Mountain America, LLC was the only property owner which perfected an appeal to the Circuit Court under W. Va. Code § 11-3-25. Rather than name each petitioner, the Circuit Court Petition merely

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[3] 488 U. S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989).

[4] This issue was raised both by the County Commission in its Response Filed on Behalf of the County Commission of Monroe County on pages 1-2 at paragraph 1, and by the Assessor in her Response of Donna Huffman, as the Assessor of Monroe County, West Virginia, to Petition for Appeal from Ad Valorem Property Tax Assessments on pages 1-2 at paragraph 1.

referred to "Mountain America, LLC et al." Accordingly, the County Commission argued that the Circuit Court Petition failed to set forth with particularity or otherwise identify by name which property owners, other than Mountain America, LLC, filed an appeal with the Circuit Court. On July 18, 2007, after considering the motion and responses and hearing argument on the issue, Judge Irons entered an "Order Granting County Commission's Motion to Confirm Mountain America, LLC, as the Sole Property Owner which has Perfected an Appeal" reasoning, in part, that:

> To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court.

Judge Irons further ruled in this order that "this matter shall proceed with Mountain America as the sole appellant" and that "the style shall be amended to delete the term, 'et al.'"

With all three procedural motions decided, Judge Irons proceeded to accept briefs on the merits of Mountain America's appeal and heard oral argument of counsel. By an Order Denying Plaintiff's Petition For Appeal From Ad Valorem Property Tax Assessments dated January 25, 2007, Judge Irons affirmed the decision of the County Commission on the grounds that "the Assessor acted in the conformity with the statutory authority, state regulations, and case law" and "valued the property appropriately within the guidelines prescribed by the West Virginia Code." Judge Irons further found in such order that "the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor."

III. POINTS AND AUTHORITIES

1. "It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. Pt. 1, *Eastern Am. Energy Corp. v. Thorn*, 189 W. Va. 75, 428 S. E. 2d 56 (1993); Syl. Pt. 1, *W. Pocahontas Properties, Ltd., v. County Com'n of Wetzel Co.*, 189 W. Va. 322, 431 S. E. 2d 661 (1993).

2. "The equal and uniform clause of Section 1 of Article X of the West Virginia Constitution requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the under valuation was intentional and systematic." Syl. Pt. 1, *Kline v. McCloud*, 174 W. Va. 369, 326 S. E. 2d 715 (1984).

3. "An objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-valued by the tax commissioner and wrongly assessed by the assessor." Syl. Pt. 8, *Killen v. Logan County Com'n*, 170 W. Va. 602, 295 S. E. 2d 689 (1982).

4. "A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous." Syl. Pt. 5, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community,* No. 33891, 2008 WL 4868290 (W. Va. Nov. 5, 2008).

5. "An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless

plainly wrong." Syl. Pt. 3, *Foster,* 2008 WL 4868290; Syl. Pt. 1, *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932); Syl. Pt. 3, *W. Pocahontas Properties, Ltd. v. County Com'n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993); Syl. Pt. 4, *In re Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment For the Tax Year 1992*, 191 W. Va. 519, 446 S.E.2d 912 (1994).

6. "As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes ... [citation omitted] ... it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989).

7. "A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend." Syl. Pt. 5, *Poling v. Bellington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999).

8. "W.Va. Code § 11-3-24 (1979) (Repl. Vol. 2008), which establishes the procedure by which a county commission sits as a board of equalization and review and

decides taxpayers' challenges to their property tax assessments, is facially constitutional." Syl. Pt. 4, *Foster,* 2008 WL 4868290; Syl. Pt. 4, *Bayer Materialscience, LLC v. State Tax Commissioner*, Nos. 33378, 33880 and 33881, 2008 WL 4967058 (W. Va. Nov. 19, 2008).

9. "[T]he applicable statutory law establishes that county commissioners' salaries are set by the Legislature, not by the commissioners, themselves." *Foster,* 2008 WL 4868290.

10. The county commission is a proper and necessary party to property tax appeals under W. Va. Code 11-3-25. See, e.g. *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *Bayer Materialscience,* 2008 WL 4967058.

11. "Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation...may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court..." W.Va. Code §11-3-25.

12. In tax cases, appeal deadlines and procedures are jurisdictional in nature. See e.g. *Helton v. Reed,* 219 W. Va. 557, 638 S.E.2d 160, 162-163 (2006); *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 617 S. E. 2d 845 (2005) (Tax Commissioner's intent was irrelevant and procedural error prohibited consideration of Commissioner's appeal); *Solution One Mortg., LLC v. Helton,* 216 W. Va. 740, 613 S. E. 2d 601 (2005) (tax statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional). *See also Elk Run Coal Company v. Babbit*, 930 F. Supp. 239 (S. D. W. Va. 1996)

(government could not appeal due to missed deadline); *Bradley v. Williams,* 195 W. Va. 180, 465 S. E. 2d 180 (1995) (taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner precludes the taxpayer's claim for refund or credit); *Webb v. U.S.,* 66 F. 3d 691 (4th Cir. 1995) (no equitable tolling of tax filing deadlines).

13. "In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." W.V.R.C.P. 10.

14. "An appellant is one who has presented his petition to the supreme court for an appeal, showing that he is aggrieved, or has united with others in an appeal setting forth his grievances by pointing out the error of the lower court. Parties not named cannot become appellants by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only appellant in such case is the person whose name appears in the petition. To be an appellant the party must by name unite in the petition for an appeal. The doctrine of parties by representation has no application to such a case." *Michie's Jurisprudence of Virginia and West Virginia,* Volume 1B, Appeal and Error, Section 121 (2005 Replacement) (citing *Challice v. Clark,* 163 Va. 98, 175 S. E. 770 (1934)).

IV. DISCUSSION OF THE LAW

A. THE CIRCUIT COURT PROPERLY UPHELD THE ASSESSMENTS OF MOUNTAIN AMERICA'S UNSOLD LOTS AND RESIDUE PROPERTY

Pursuant to Judge Irons' "Order Granting County Commission's Motion to Confirm Mountain America, LLC, as the Sole Property Owner Which Has Perfected an Appeal" signed on July 17, 2007, Appellant Mountain America, LLC was determined to be the sole taxpayer/property owner which had perfected an appeal to the Circuit Court. Mountain America is the developer of Walnut Springs. For tax year 2007, the Assessor assessed five (5) parcels or tracts of land owned by Mountain America on July 1, 2006. All five of these tracts of land owned by Mountain America are "residue" in that they represent lots or other property which at the time of assessment had not yet been sold by the developer. The County Commission understands that the total tax bill (for tax year 2007) with regard to Mountain America's five parcels of unsold lots or residue is approximately $9,500.00.

1. The Assessments of Mountain America's Property Are More Than Reasonable. The Assessor valued Mountain America's unsold lots and residue at $5,372.00 per acre, which values were confirmed by the County Commission sitting as the Board of Equalization and Review. Tr. at Exhibit P-11. Lots within Walnut Springs have sold for an average of $30,481.00 per acre. Tr. at 72. The Assessor, however, further adjusted and reduced the average sales price of the sold lots ($30,481.00) to $26,900.00 per acre by disregarding a few high and low sales. Id.

Mountain America surprisingly asserts that the assessments of its unsold residue are "not reflective of their true and actual value." Appellants' Brief at 11. With lots

within Walnut Springs selling at an average of $30,481.00 per acre (which the Assessor reduced to $26,900.00 per acre as described above), the Assessor's valuation of Mountain America's unsold lots and residue at only $5,372.00 represents less than 20% of the average sale price per acre of $30,481.00/$26,900.00. Given this, it is difficult to understand why Mountain America challenges the Assessor's valuation of the unsold lots and residue. For the same reasons, it is curious as to why and on what basis Mountain America claims that assessing its residue or unsold lots at less than 20% of what lots in Walnut Springs have actually sold for results in excessive taxation or a violation of Mountain America's constitutional rights.

An example illustrates what is really occurring here. By Deed dated September 12, 2006, Mountain America, LLC conveyed to Justin and Mary Frances Daly of Washington, D.C. a lot in Walnut Springs consisting of 6.8 acres. The Daly's paid $191,500.00 to Mountain America for this 6.8 acre lot, or an average of $28,161.76 per acre. Tr. at Exhibit P-4.[5] For the assessment date of July 1, 2006 (merely seventy-three days prior to the sale to the Daly's), the Assessor valued this same 6.8 acres at approximately $36,500.00 (based on $5,372.00 per acre) resulting in taxes to Mountain America of about $500.00. Somehow, Mountain America asks this Court to believe that the Assessor was not only incorrect when valuing these 6.8 acres, but intentionally and systematically violated Mountain America's constitutional rights by valuing this 6.8 acre tract at $36,500.00 and assessing $500.00 in taxes when Mountain America sold it seventy-three days after the assessment date for $191,500.00.

[5] The sale to the Daly's is noted in Mr. Goldman's spreadsheet introduced by the Appellants at the February 7, 2007 hearing as Exhibit P-4. Attached hereto as **Exhibit A** is a certified copy of the Deed at issue.

2. **Mountain America Did Not Meet Its Burden of Proof.** Mountain America did not offer any evidence to the County Commission as to the true and actual value of its unsold lots and residue. As stated earlier, Mountain America's principal witness at the hearing before the County Commission, Todd Goldman, is a certified general real estate appraiser. Tr. at 8 and 47. However, at no time did Mr. Goldman testify as to what he believed was the "true and actual value" (or fair market value) of any of Mountain America's property. Despite being an appraiser, Mr. Goldman appraised nothing at all. Tr. at 51.[6] In fact, Mountain America introduced no evidence whatsoever as to the fair market value of the unsold lots or residue. As such, there is no evidence in the record indicating that the Assessor overvalued the unsold lots or residue. The Circuit Court properly characterized and applied the standard of review, as follows:

> ...it is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct, since the burden of showing an assessment to be erroneous is upon the taxpayer, and proof of such fact must be clear. Eastern Am. Energy Corp. v. Thorn, 189 W. Va. 75 (1993). Simply put, it is the burden of the taxpayer to show that the valuations set by the county are excessive. Syl. Pt. 1, W. Pocahontas Properties, Ltd., v. County Comm'n of Wetzel Co., 189 W. Va. 322, (1993).
>
> Kline v. McCloud, 174 W. Va. 369, the West Virginia Supreme Court stated that "The Equal and uniform clause of Article X, Section 1 of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show *more than* the fact that other property is valued at less than true and actual value. To obtain relief, he

[6] Mr. Goldman, with respect to the unsold lots and residue, evaluated data from Longview Estates and some properties neighboring Walnut Springs and concluded that the appraised values of Mountain America's residue ($5,372.00 per acre) are higher than that of both Longview Estates and the neighboring properties. Tr. at 14-16. This conclusion, by itself, proves nothing. Mr. Goldman asserts that "stepping across" the boundary line of Walnut Springs would save you significant property taxes. True; however, land in Walnut Springs is selling for over $30,000 an acre, and there is no evidence that the land just across the boundary line from Walnut Springs has sold or would sell anywhere near such price. Had Mr. Goldman been asked to appraise land in Longview Estates and land neighboring Walnut Springs then a meaningful comparison could perhaps be made.

must prove that the under valuation was intentional and systematic. (*emphasis added*).

> ...an objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under valued or over valued by the Assessor. Syl. Pt. 8, Killen v. Logan County Comm'n, 170 W. Va. 602 (1982).

Order Denying Plaintiff's Petition for Appeal from Ad Valorem Property Tax Assessments at 2-4. This Court has very recently held that "[a] taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous," *Foster* at Syl. Pt. 5, and that:

> An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong." Syl. Pt. 1, *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932).' Syl. Pt. 3, *Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993)." Syl. Pt. 4, *In re Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment For the Tax Year 1992*, 191 W. Va. 519, 446 S.E.2d 912 (1994).

Foster at Syl. Pt. 3. No evidence was offered by Mountain America to satisfy such burden. Mountain America did not introduce any evidence as to what it paid for the unsold lots or residue. No appraisals were offered. In addition, there was no evidence submitted for the County Commission's consideration as to what Mountain America's listing/asking price is for any of this unsold property. Mountain America failed to give the County Commission basic information regarding the unsold lots in what appears to be an attempt to avoid the awkward position of a developer claiming that unsold lots are not worth the prices sold lots have realized. The burden of proof, however, cannot be met without this information.

3. **Mountain America Failed To Take Advantage Of The Relief Afforded By W. Va. Code §11-3-1b.** W.Va. Code §11-3-1b affords certain property tax relief to developers who have recorded a development plat or designation of land use with the appropriate county commission. Generally speaking, pursuant to this statute, a developer who has so recorded a plat with the county commission receives valuation of its unsold residue based on techniques which do not consider the sale prices of sold lots. Here, Mountain America admits that "[n]either Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development plat or designation of land use with the County Clerk." Appellants' Brief at 4. By not recording a plat, Mountain America is not eligible for the relief provided by W.Va. Code §11-3-1b. As such, the Assessor and the County Commission have no obligation to afford such relief to Mountain America or to apply the valuation methodologies of W.Va. Code §11-3-1b. Nonetheless, the Assessor obviously afforded significant relief to Mountain America by valuing the residue at $5,372.00 per acre when lots have sold for five times higher.

4. **Appellants Misconstrue The *Allegheny Pittsburgh* Case.** The facts and legal logic of *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), are not as similar to this case as the Appellants assert. In fact, the Appellants completely misconstrue the *Allegheny Pittsburgh* case. The taxpayers in *Allegheny Pittsburgh* showed that other "comparable" property (coal) in Webster County was worth substantially the same as their property but was "intentionally and systematically" assessed at lower values by the county. Id. at Syl. Pts. 2 and 3. Property in Walnut Springs has not been shown to be

"comparable" to any other property in Monroe County. Rather, Mountain America's successful marketing techniques have apparently convinced at least certain members of the public that land within Walnut Springs is not "comparable" to that of the rest of Monroe County, but instead is unique, superior and much more valuable. Judge Irons correctly reasoned that:

> As the West Virginia Supreme Court stated in *Kline*, that "The Equal and uniform clause of Article X, Section 1 of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show *more than* the fact that other property is valued at less than true and actual value" ... One thing that does appear clear in the arguments to the Court and in the record below is that the Taxpayers feel that other property surrounding Walnut Springs is valued at less than it's true and actual value, but there is no evidence in record to show that such property was intentionally and systematically under valuated as required by West Virginia state law.
>
> Instead, it appears from the record that the property that surrounds the property in question has always sold for prices much below the price of lots in Walnut Springs. This in turn causes the adjoining property to sell for and be assessed at a much lower rate. Although the record is not clear as it might be, it appears that the lots contained in Walnut Springs have been developed and contain many amenities not available on the adjoining lands and are only available in the new neighborhood, thus causing the adjoining lands to sell for much lower prices and the resulting assessments.

Order Denying Plaintiff's Petition for Appeal from Ad Valorem Property Tax Assessments dated January 25, 2008, at 8-9.

Also, in *Allegheny Pittsburgh*, the taxpayers showed that the assessor had failed to make valuation adjustments to comparable land for "more than 10 years." 488 U.S. at 344, 102 L.Ed.2d. at 697. Walnut Springs is a new development and the 2007 tax year is the first in which a dispute has arisen. The U.S. Supreme Court held:

> As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the

> assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes ... [citation omitted] ... it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

488 U. S. at 344, 102 L. Ed. 2d at 697. Even if this Court adopts the Appellants' position that the Walnut Springs properties are "comparable" and that disparate treatment has occurred[7], the rule of law set forth in *Allegheny Pittsburgh* does not afford the Appellants relief at this time as the Appellants ask this Court to afford "immediate general adjustment" of their taxes while denying Monroe County the required opportunity to make "seasonable attainment of a rough equality" over a "short period of time."

Finally, in *Allegheny Pittsburgh,* the Webster County Assessor was portrayed by the U.S. Supreme Court as a renegade who acted "on her own initiative" to apply the tax laws in an unconstitutional manner and "contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors ..." 488 U. S. at 346, 102 L. Ed. 2d at 699. Here, Donna Huffman, the Assessor of Monroe County, did not act on her own initiative or contrary to guidance of the Department of Tax and Revenue. Rather, she worked directly with the Department of Tax and Revenue when compiling the

[7] Although Mr. Goldman is a real estate professional, he is not a statistician. His comparison of the assessments to those of other properties in the County is statistical in nature, but he is not qualified to give testimony of a statistical nature. There are over 12,000 taxable parcels of real estate in Monroe County (Tr. at 79), and Mr. Goldman's statistical analysis of assessments across the County is not competent or admissible. Only a qualified statistician can determine what type and amount of data is statistically relevant. Mr. Goldman made certain random selections, but without applying proven statistical analysis it is impossible to know whether his conclusions are accurate to a reasonable degree of statistical certainty or are mere happenstance. The Appellants did not ask Mr. Goldman his opinion as to the fair market value of any land in the County (including their own), which opinion Mr. Goldman would have been qualified to give. The Appellants, rather, chose to have Mr. Goldman testify as to statistical issues which are beyond his expertise. Even if admissible, very little, if any, weight can be given to his testimony.

assessments at issue. Tr. at 72. As Judge Irons noted, "[a]t the oral argument on their appeal, the Taxpayers' counsel was unable to point to a single deviation from state regulations by the Assessor." Order Denying Plaintiffs Petition for Appeal from Ad Valorem Property Tax Assessments dated January 25, 2008 at 7.

The proper application of *Allegheny Pittsburgh* mandates denial of the relief sought by the Appellants in this case.

5. West Virginia's System for Review of Property Tax Assessments, As Applied in this Case, Did Not Violate the Appellants' Rights to Due Process of Law.

a. The Appellants' Due Process Claims Were Not Timely or Properly Raised in Circuit Court. The Appellants present several arguments in support of their position that the State's system for review of property tax assessments is unconstitutional and violates their due process rights. It is important for this Court to recognize that the Appellants did not raise any of these due process arguments before the County Commission and, more importantly, also failed to include any due process issues in the original petition filed with the Circuit Court (the "Circuit Court Petition"). Rather, the Appellants first attempted to raise these arguments by asking leave of the Circuit Court to amend the Circuit Court Petition. Motion to Amend Petition for Appeal dated May 30, 2007. Judge Irons of the Circuit Court denied this motion, reasoning:

> The second argument postulated in the Motion to Amend is that the entire statutory appeal structure of tax assessments and the Board of Equalization is unconstitutional. This argument is clearly beyond the scope of this proceeding as an appeal from a decision of the Board of Equalization. It is also beyond the scope of the original petition and constitutes a separate and distinct declaratory action. Furthermore, the West Virginia Supreme Court of Appeals has stated "The liberality allowed in the amendment of pleadings pursuant to

> Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims." Syllabus Point 3 (in part), State ex rel. Vedder v. Zakaib, 217 W.Va. 528, 618 S.E.2d 537 (2005). Clearly, this assertion of unconstitutionality is a claim most properly raised in an independent action. If advanced in this proceeding, prejudice to the respondents would clearly result from an increased time and financial burden to defend against an argument first raised in the midst of the appeal. It would also greatly broaden the scope of the proceeding and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues.

Order Denying Taxpayers/Petitioners Motion to Amend Petition for Appeal at 2.

An "abuse of discretion" standard of review is applicable to the Circuit Court's order denying the Appellants' motion to amend the Circuit Court Petition to include due process claims. See Syl. Pt. 5, *Poling v. Bellington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999) ("A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend."). Judge Irons, noting that the Appellants had not raised any due process concerns in their original petition to him, denied the Appellants' motion for leave to amend the petition to assert due process claims by finding prejudice to the adverse parties and giving several just grounds for his ruling as set forth above. Judge Irons' ruling was well within his discretion and not an abuse thereof.[8]

[8] The Appellants' brief leads one to believe that Judge Irons heard their due process arguments and ruled against them on the merits of the same. Such is simply not the case. Rather, Judge Irons refused to hear the Appellants' due process arguments at all. If this Court finds that Judge Irons abused his discretion in denying the Appellants' motion for leave to amend their Circuit Court Petition to allege due process claims, then this Court could remand the due process issues to Judge Irons for ruling on the merits thereof. See e.g. *Chafin v. Wellman*, 156 W.Va. 236, 192 S.E.2d 490 (1972). On the other hand, the undersigned is mindful of this Court's decision in

b. This Court's Opinions in *Foster and Bayer Materialscience* Are Dispositive; No Direct Pecuniary Interest Exists. This Court has recently held that:

> W.Va. Code § 11-3-24 (1979) (Repl. Vol. 2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional.

Foster at Syl. Pt. 4; *Bayer Materialscience* at Syl. Pt. 4. Such holding is dispositive of several, if not all, of the due process claims advanced by the Appellants.

Nonetheless, the Appellants claim that this Court "overlooked" the effects of W.Va. Code § 7-7-1 et seq. in finding the property tax procedures set forth in W.Va. Code §11-3-24 facially constitutional. In an effort to avoid the precedent set by this Court's opinions in *Foster* and *Bayer Materialscience*, the Appellants now for the first time in this case suggest that the Monroe County Commissioners do indeed have a direct pecuniary interest by virtue of the fact that W.Va. Code § 7-7-1 operated to grant them a $660.00 pay raise. In actuality, this Court in *Foster* did consider the effect of § 7-7-1 on this issue:

> The Foundation does not present any specific evidence to suggest how the county commissioners, themselves, directly benefitted from these funds or to indicate the commissioners had a direct, pecuniary interest in such revenue. In fact, the applicable statutory law establishes that county commissioners' salaries are set by the Legislature, not by the commissioners, themselves. *See* W. Va. Code § 7-1-5 (discussing compensation of county commissioners); W. Va. Code § 7-7-4 (2006) (Repl. Vol.

Foster to consider due process issues which had not been raised in, or ruled on by, the circuit court. As such, the undersigned will proceed to address the Appellants' due process claims herein.

2006) (defining amount of compensation of county commissioners).

This Court has correctly characterized the setting of commissioners' salaries as being "set by the Legislature, not by the commissioners, themselves," and, as such, no direct pecuniary interest exists.

The Appellants, in a practical sense, are asserting that the Monroe County Commissioners have received a pay raise for confirming the Assessor's increased valuations of properties across the county. The Legislature thinks otherwise. In its enumerated findings and purposes for § 7-7-1, the Legislature stated that it has "consistently and annually imposed upon the county commissioners [and other county officials] new and additional duties" caused by the enactment of statutory changes, through acts of Congress and otherwise, and that "there is a direct correlation between the total assessed property valuations of a county on which the salary levels of the county commissioners [and other county officials] are based, and the new and additional duties that each of these officials is required to perform as they serve the best interests of their respective counties." W.Va. Code § 7-7-1 (a)-(c). The Legislature further noted that "a change in classification of counties by virtue of increased property valuations will occur on an infrequent basis" and, as such, "that when such change in classification of counties does occur, that new and additional programs, economic developments, requirements of public safety and the need for new services provided by county officials all increase...and, as such, justify the increases in compensation provided in [7-7-4] without violating the provisions of section thirty-eight, article VI of the Constitution of West Virginia." Id. at (c).

A *de minimis* increase in salary of $660.00 per year for a county commissioner which occurs on an "infrequent basis" and is statutorily justified by additional duties of the job does not constitute "direct pecuniary interest." Further, is one to assume that the legislatively-mandated pay raise only creates an impermissible direct pecuniary interest making county commissioners unable to fairly adjudicate property tax assessments in years when the county's classification may change? Such a standard proposed by the Appellants would be virtually impossible to manage. It is noted that the County Commission understands that Monroe County's change in classification from Class IX to Class VIII was not, as alleged by the Appellants, as a result of valuation increases in tax year 2007. Rather, the County Commission understands that the classification change was a result of tax year 2008 and became effective on July 1, 2008. In any event, the record in this matter does not speak to this issue.

The logical conclusion of the Appellants' position is that, in a year in which the county's classification could change, none of the county commissioners would be fit to serve on a board of equalization and review with respect to any county taxpayer's protest of any assessment by the assessor. Such cannot be the case. If so, who then would serve as the board of equalization and review?

c. Statutory Time Frame Followed; No Prejudice Shown. The Appellants also allege that their due process rights were violated due to the "constricted time frames" of the hearing process before boards of equalization and review, and further chastise the County Commission for adjourning *sine die* on February 15, 2007. First, there is no allegation that the hearing afforded to the Appellants in any way

violated W.Va. Code § 11-3-24. Rather, the hearing was in full compliance with the applicable statutory requirements.

The Appellants, however, have not advised this Court of how the hearing's allegedly constricted time frame actually prejudiced them. In other words, the Appellants have not explained what evidence they desired to present to the County Commission, sitting as the board of equalization and review, but were unable to present due to insufficient time. In this case, the Appellants hired a real estate appraiser who appears to have performed the analysis asked of him by the Appellants and who testified on their behalf at the hearing. What is telling is that the basic evidence which the Appellants failed to present at the hearing for the County Commission's evaluation is evidence which was easily within the Appellants' reach. For example, Mountain America, as the developer, could have easily advised the County Commission at the hearing what it paid for the land at issue and what it expended in developing and improving the land. The Appellants also could have easily introduced evidence as to appraisals of their land which had already been prepared for the benefit of lenders during financing, but not one such appraisal was provided by the Appellants to the County Commission. Also, the Appellants specifically did not ask Mr. Goldman, a certified appraiser, to appraise any of the Walnut Springs properties for the benefit of the County Commission. Moreover, Mountain America failed to introduce evidence at the hearing as to the listing price for any lots it had for sale in Walnut Springs. This basic evidence was not provided to the County Commission because the Appellants apparently did not desire the County Commission to have the benefit of the same when making its decision. Constricted time frames are not the culprit here.

d. The County Commission Is A Proper Party. The Appellants' claim that the County Commission is not a proper party on appeal is without merit. As previously discussed, the County Commission filed an answer or response[9] to the Circuit Court Petition because the County Commission was ordered to do just that by the Circuit Court at the specific request of Appellants' counsel who prepared and submitted the order. In any event, a review of the reported cases in the State of West Virginia involving property tax valuation disputes clearly shows that the county commission is a proper and necessary party in these type of cases. It is clear that the Cabell County Commission was a party in *Foster*, and that the Kanawha County Commission was a party in *Bayer Materialscience*. Moreover, there are at least fifteen (15) additional examples of reported property tax valuation cases in West Virginia spanning many decades in all of which the appropriate county commission is a party.[10]

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[9] See the Response Filed on Behalf of the County Commission of Monroe County on March 28, 2007. The Appellants also complain that the County Commission's response to its Circuit Court Petition shows "bias and lack of impartiality." Appellants' Brief at 40. The County Commission, in its response, urged Judge Irons to affirm the Commission's own ruling that the assessments were proper. This should be of no surprise to the Appellants. The Appellants seem to assert that the County Commission, after affirming the assessments, should now for purposes of the appeal take positions supporting the Appellants. The County Commission is not biased against the Appellants. Rather, the County Commission is simply not persuaded by the Appellants' position in this case.

[10] *Central Realty Co. v. Board of Equalization and Review of Cabell County*, 110 W. Va. 437, 158 S.E. 537 (1931); *Crouch v. County Court of Wyoming County*, 116 W. Va. 476, 181 S.E. 819 (1935); *Gilbert v. County Court of Wyoming County*, 121 W. Va. 647, 5 S.E.2d 808 (1939); *In re Stonestreet*, 147 W. Va. 719, 131 S.E.2d 52 (1963) (the defendants are identified as "A. R. Holbert, Jr., Donald W. Morris and Loyd Wright, Commissioners of the County Court of Calhoun County"); *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, 164 W. Va. 94, 261 S.E.2d 165 (1979) ("The respondents are elected members of the Mingo County Commission, and in this capacity, sat as a Board of Equalization and Review during the month of February, 1978"); *The Great A & P Tea Co., Inc. v. J. Carney Davis, Assessor of Marion County, West Virginia, and Marion County Board of Review and Equalization*, 167 W. Va. 53, 278 S.E.2d 352 (1981); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, and East Kentucky Energy Corp. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989); *Eastern American Energy Corporation v.*

It is important to note that, in the case of *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*[11] which is the principal authority cited by the Appellants, the case commenced before the Webster County Commission sitting as a Board of Equalization and Review, then proceeded on to the Circuit Court of Webster County, the Supreme Court of Appeals of West Virginia and finally to the United States Supreme Court. The County Commission of Webster County was clearly a party to the *Allegheny Pittsburgh* case as noted by the style of the case. This Court, as well as the United States Supreme Court, found no fault with the county commission being a party.

Judge Irons of the Circuit Court did not err in ruling that the County Commission was a proper and necessary party, as the Appellants themselves made the County Commission a party to the appeal and the relevant authorities confirm the validity of the same.[12]

Robert W. Thorn, Assessor of Wirt County, and C. Richard Boice, Commissioner of the County Commission of Wirt County, Paul Bumgarner, Commissioner of the County Commission of Wirt County, and Harry Matheny, Commissioner of the County Commission of Wirt County, in Their Capacities as County Commissioners and in Their Capacities as Members of the County Board of Equalization and Review, 189 W.Va. 75, 428 S.E.2d 56 (1993); *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993); *In re Elk Sewell Coal*, 189 W. Va. 3, 427 S.E.2d 238 (1993) ("Ernest V. Morton, Jr., Pros. Atty., Webster Springs" is listed as attorney "for Webster County Com'n."); *Rawl Sales & Processing v. County Commission of Mingo County*, 191 W.Va. 127, 443 S.E.2d 595 (1994); *In re the Petition of Maple Meadow Mining Company for Relief from Real Property Assessment for the Tax Year 1992*, 191 W.Va. 519, 446 S.E.2d 912 (1994) ("Carl W. Roop, Canterbury, Poling & Roop, Beckley, for Raleigh County Commission"); *Bookman v. Hampshire County Commission*, 193 W.Va. 255, 455 S.E.2d 814 (1995); *In re the 1994 Assessments of the Property of Massimo A. Righini, Marilou M. Righini, J. David Magistrelli and Diane Magistrelli*, 197 W.Va. 166, 475 S.E.2d 166 (1996) ("Richard G. Gay, Berkeley Springs, for Morgan County Commission"); *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000) ("Frances C. Whiteman Esq., Whiteman, Burdette & Radman, PLLC, Fairmont, West Virginia" is listed as "Attorney for Appellant Marion County Commission."). Full citation format has been used here to display the names of all parties involved.

[11] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed. 2d 688 (1989).

[12] The Appellants also claim a conflict of interest arises as the Prosecuting Attorney is authorized pursuant to W.Va. Code § 11-3-24 to represent the assessor and the county commission. In this case, the Prosecuting Attorney of Monroe County asked the undersigned counsel to represent the

B. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT MOUNTAIN AMERICA, LLC WAS THE ONLY TAXPAYER WHICH PERFECTED AN APPEAL

W.Va. Code §11-3-25 provides that:

> Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation...may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court...

As such, the statute requires a property owner who is displeased with a ruling of the County Commission regarding his or her property tax assessment to file an appeal in circuit court within thirty days. Otherwise, the County Commission's decision stands.

In this case, the Petition for Appeal from Ad Valorem Property Tax Assessments (the "Circuit Court Petition") purported to be filed by Mountain America, LLC and "several dozen individuals and entities." However, the Circuit Court Petition failed to set forth with particularity or otherwise identify by name which property owners, other than Mountain America LLC, were filing an appeal. Simply put, no other parties were named within the four corners of the Circuit Court Petition. Such being the case, no other parties (other than Mountain America, LLC) complied with the jurisdictional appeal requirements of W.Va. Code § 11-3-25 which requires that a taxpayer file an appeal with the Circuit Court within thirty days.

W.V.R.C.P. 10 provides that "[i]n the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." By analogy in this instance the Circuit Court Petition serves as the "complaint" and does not

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County Commission while Dinsmore & Shohl has been asked to represent the Assessor. As such, any conflict of interest alleged by the Appellants does not exist in this matter.

"...include the names of all of the parties...". As this Court is aware, "et al." is a Latin phrase meaning "and others." The problem here is simply that the Circuit Court Petition did not name who the "others" are.

The Appellants have attempted to confuse this Court, and unsuccessfully attempted to confuse the Circuit Court, by reciting that the parties were aware of the identities of all of the taxpayers involved in the February 7 hearing held by the County Commission sitting as a Board of Equalization and Review. Appellants' Brief at 42-44. The record below contains a stipulation with regard to the taxpayers and tracts of land at issue at the February 7, 2007 hearing. Indeed, such stipulation was requested by the County Commission so that there would be no confusion as to which taxpayers were involved in the February 7 hearing. Which taxpayers were involved at the February 7 hearing is not the question here. Rather, the question is which property owners properly appealed their assessments to the Circuit Court. These two questions do not require the same answer. Just because a property owner was involved in the February 7 hearing does not mean that such property owner perfected an appeal to the Circuit Court.

Michie's Jurisprudence of Virginia and West Virginia provides:

> An appellant is one who has presented his petition to the supreme court for an appeal, showing that he is aggrieved, or has united with others in an appeal setting forth his grievances by pointing out the error of the lower court. Parties not named cannot become appellants by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only appellant in such case is the person whose name appears in the petition. To be an appellant the party must by name unite in the petition for an appeal. The doctrine of parties by representation has no application to such a case.

Michie's Jurisprudence of Virginia and West Virginia, Volume 1B, Appeal and Error, Section 121 (2005 Replacement) (emphasis added). *Michie's* cites the Virginia case of *Challice v. Clark*, 163 Va. 98, 175 S. E. 770 (1934). In *Challice*, the Virginia court held:

> The petition for an appeal begins: "Your petitioner, Nettie O. Challice, et als, respectfully represents that they are aggrieved" by this decree; but Nettie O. Challice is the only petitioner named in it. It concludes: "The court below committed error when it denied your petitioner relief. Its decree is manifestly wrong and should be reviewed and revised." It is signed "Nettie O. Challice, et als, by John G. Challice, attorney."
>
> The petition is wholly insufficient as a petition for an appeal by any person other than Nettie O. Challice, and the appeal which has been granted is and must be treated as an appeal by her alone.

The controlling point here is that Judge Irons, upon reviewing the Circuit Court Petition, could not identify the names of any petitioners other than Mountain America. Judge Irons reasoned that:

> To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question ... The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court.

"Order Granting County Commission's Motion to Confirm Mountain America, LLC, as the Sole Property Owner which has Perfected an Appeal" dated July 17, 2007. This is a straightforward matter of pleading, and the Circuit Court did not err in ruling that only Mountain America had perfected an appeal.

In tax cases, appeal deadlines and procedures are jurisdictional in nature. Equitable arguments are irrelevant. If a party does not file an appeal within the time period required by statute, or does not otherwise perfect his or her appeal, the ruling

below stands as a matter of law. This principle has been addressed by this Court in several instances. For example, in the highly publicized *U. S. Steel II* case of recent years, the State of West Virginia forfeited nearly $20.0 million dollars in severance taxes because the Tax Commissioner missed the statutory deadline for filing an appeal by ten (10) days. The circuit court ruled that the filing deadline in question was "jurisdictional" and dismissed the appeal without addressing the merits of the case. This Court, "agreeing that the deadline that the Commissioner had missed by ten days was jurisdictional," refused to hear the Tax Commissioner's appeal. See discussion of *U. S. Steel II* (Kanawha County Civil Action No. 04-AA-16) in *Helton v. Reed*, 219 W.Va. 557, 638 S.E.2d 160, 162-163 (2006). In the case of *Helton v. Reed*, the taxpayer made the mistake of filing its severance tax appeal with the wrong administrative tribunal. This Court did not allow the taxpayer to cure this filing defect on the grounds that "filing requirements established by statute ... are not readily susceptible to equitable modification or tempering" and cited several cases as examples of such principle of law:

> *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 617 S. E. 2d 845 (2005) (Tax Commissioner's intent was irrelevant and procedural error prohibited consideration of Commissioner's appeal); *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 195 W. Va. 537, 466 S. E. 2d 388 (1995) (strict deadlines in insurance insolvency cases); *Solution One Mortg., LLC v. Helton*, 216 W. Va. 740, 613 S. E. 2d 601 (2005) (tax statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional). *See also Elk Run Coal Company v. Babbit*, 930 F. Supp. 239 (S. D. W. Va. 1996) (government could not appeal due to missed deadline); *Bradley v. Williams*, 195 W. Va. 180, 465 S. E. 2d 180 (1995) (taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner precludes the taxpayer's claim for refund or

> credit); *Webb v. U.S.*, 66 F. 3d 691 (4th Cir. 1995) (no equitable tolling of tax filing deadlines) ...

Helton v. Reed, 219 W. Va. 557, 638 S. E. 2d 160, 164 (2006). These authorities were considered by Judge Irons and provide additional support for his decision that only Mountain America, LLC had perfected an appeal pursuant to W.Va. Code § 11-3-25.

All of the other Appellants were properly dismissed from the case. To that end, Judge Irons did not rule on the merits with regard to the assessments of any Appellant other than Mountain America, LLC.[13] Such being the case, should this Court determine that the Circuit Court erred in dismissing one or more of the Appellants, then it is respectfully asserted that this Court should remand the same to the Circuit Court for ruling on the merits thereof. See e.g. *Chafin v. Wellman*, 156 W.Va. 236, 192 S.E.2d 490 (1972).

V. CONCLUSION

The real estate of Mountain America, LLC was properly assessed by Monroe County for the 2007 tax year. A tax bill of $9,500.00 to a developer which is based on the Assessor's value of $5,400.00 per acre cannot be excessive or unconstitutional when land in the same development has actually been sold by the developers for $30,000.00 per acre. Also, as shown herein, the Circuit Court properly dismissed all other Appellants from the case for failure to perfect an appeal as required by W.Va. Code § 11-3-25.

[13] The Appellants, in their brief to this Court, raise many issues pertaining to assessments of parties (other than Mountain America, LLC) who were dismissed from the case by the Circuit Court. It is respectfully submitted that such issues are not properly the subject of this appeal.

For the reasons set forth above, the County Commission respectfully prays that this Court deny the relief sought by the Appellants and affirm the rulings of the Circuit Court of Monroe County.

COUNTY COMMISSION OF MONROE COUNTY, WEST VIRGINIA

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EXHIBITS

ON

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